EDWARD H. SWARTZ

IBLA 76-552 Decided October 29, 1976

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting public sale application W-31203.

Set aside and remanded.

1. Geological Survey -- Public Sales: Generally -- Public Sales: Applications

Where the Bureau of Land Management rejects a public sale application based on a determination by Geological Survey that certain lands encompassed by a public sale application contain workable coal deposits and Geological Survey's conclusion that the exercise of surface rights will unreasonably interfere with operations under the mineral leasing law, the case will be remanded for further consideration when the bare conclusion of the Geological Survey is unsupported by any facts and where there is a lack of evidence in the record to support such conclusion.

APPEARANCES: Edward H. Swartz, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On September 27, 1971, Edward H. Swartz filed an application to purchase 120 acres in Campbell County, Wyoming, pursuant to the Unintentional Trespass Act of September 26, 1968, 43 U.S.C. §§ 1431-35 (1970). 1/

1/ The 120 acres consisted of three 40-acre tracts: SW 1/4 NE 1/4 sec. 12, T. 53 N., R. 73 W., 6th P.M.; SE 1/4 SE 1/4 sec. 32, T. 54 N., R. 72 W., 6th P.M.; NE 1/4 SW 1/4 sec. 33, T. 54 N., R. 72 W., 6th P.M.

The application was forwarded to the United States Geological Survey for a mineral status report and on January 21, 1972, Geological Survey informed BLM that while the land was valuable for oil and gas, exercise of surface rights would not unreasonably interfere with operations under the mineral leasing laws.

No action was taken by BLM on the application and in October 1975, BLM sought an update of the mineral status of the land. By memorandum dated January 14, 1975, to the District Manager, BLM, Casper, Wyoming, from the Assistant Area Geologist for the Director, Geological Survey, BLM was informed that:

> Geological Survey information indicates that the SE 1/4 SE 1/4 sec. 32, T. 54 N., R. 72 W., and SW 1/4 NE 1/4 sec. 12, T. 53 N., R. 73 W., Sixth Principal Meridian, Wyoming, included in Public Sale Application W-31203, of Edward H. Swartz are within a known coal leasing area. All of the lands in W-31203 are contained in coal preference lease applications, W-8307, W-8308, and W-8309. The exercise of surface rights on the lands in Public Sale Application W-31203 would interfere unreasonably with operations under the mineral leasing law.

On February 25, 1976, BLM issued a decision rejecting public sale application W-31203. BLM stated that, pursuant to 43 CFR 2093.0-3(a), a nonmineral application such as W-31203 may be allowed only if disposal is concurred in by the Director, Geological Survey. BLM concluded that in light of the determination by Geological Survey, disposal of the land would not be proper.

Appellant does not question the fact that coal may be present on the lands in question. The crux of his argument is that mining would not be feasible on the three tracts in question. With respect to the specific tracts, he stated that the 40 acres in section 12 are completely surrounded by privately owned surface and on two sides by privately owned minerals; that he has adjudicated water rights which would be adversely affected by mining; and that the land is split by a country road. He alleges that the 40 acres in section 32 vary in elevation so as to make it impractical as a mine site and also a road crosses the tract which provides access to a neighbor's ranch.

Appellant also contends that since the 40-acre tract in section 33 was not specifically mentioned in the rejection, there should be no objection to its sale.

Upon review of the case file by the Board, it was determined that more information was necessary concerning Geological Survey's conclusion that "exercise of surface rights on the lands in Public Sale Application W-31203 would interfere unreasonably with operations under the mineral leasing act." Therefore, we directed a letter dated June 24, 1976, to the Director, Geological Survey, making the following request:

> There is pending before this office appeal IBLA 76-552 of Edward H. Swartz from the rejection of his public sale application W-31203 (Act of September 26, 1968, 43 U.S.C. § 1431-1435), pursuant to the Survey's memo of January 14, 1976.
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> That memo, signed by W. L. Rohrer, Ass't Area Geologist, omits mention of the NE 1/4 SW 1/4 sec. 33, T. 54 N., R 72 W., 6th P.M., Wyoming, but nevertheless concludes that all the lands included in the application should be rejected.
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> The memo states in part that "[t]he exercise of surface rights on the lands in Public Sale Application W-31203 would interfere unreasonably with operations under the mineral leasing law."
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> I am enclosing a copy of appellant's statement of reasons.
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> Please reexamine the findings embodied in the memo of January 14, 1976, and if you adhere to them, furnish me with a detailed statement showing your reasons for your conclusion. Your comments on appellant's statement of reasons would also be appreciated.

The letter response from Geological Survey was filed on October 5, 1976, and was signed by Elmer M. Schell, Area Geologist. The letter explained that coal prospecting permits (W-8307, W-8308, and W-8309) had been filed on March 1, 1968, and that the lands described in the public sale application were encompassed by the permits. In 1971 a preference right lease application was filed for the same lands covered by the permits.

It was stated that while the NE 1/4 SW 1/4 sec. 33, T. 54 N., R. 72 W., was not mentioned specifically in the January 14, 1976, mineral report as being within a known coal leasing area, all the lands included in the public sale application were contained in the preference right lease application. The stated basis for the conclusion that the surface should not be sold was "the pending

preference right lease application" and "the fact that the lands were underlain by workable coal."

The letter explained in great detail the lithology of a general stratigraphic section of each tract, the depth of the coalbeds, and other information concerning the occurrence of coal on the lands. However, as set forth supra, appellant does not dispute the occurrence of coal on the lands nor do we doubt the expertise of Geological Survey in determining the existence of coal on such land. What is disturbing is the inability or unwillingness of Geological Survey to provide support for its conclusion that exercise of surface rights would unreasonably interfere with operations under the mineral leasing law. while the Board's letter of June 24, 1976, to Geological Survey requested "a detailed statement showing the reasons for your conclusion," Geological Survey merely provided a detailed statement establishing the existence of coal on the lands embraced in the public sale application.

It does not necessarily follow that because lands contain coal and there is an outstanding preference right lease application for such lands that exercise of surface rights would unreasonably interfere with operations under the mineral leasing law. This is especially true herein in that appellant has alleged certain factors such as the existence of water rights, a country road and private ownership of adjacent lands which would militate against the development of at least some of these lands for coal production.

We are cognizant of rulings that this Board will not disturb a mineral classification or determination made by Geological Survey in the absence of a clear showing that the determination was improperly made. The Kemmerer Coal Company, 26 IBLA 127 (1976); William J. Colman 9 IBLA 15 (1973). However, the determination of the existence of valuable coal deposits on the lands herein is not in dispute; what is at issue is the conclusion of the Geological Survey concerning the exercise of surface rights. The burden is on appellant to present a convincing and persuasive argument to rebut the conclusion of Geological Survey. The Kemmerer Coal Company, supra at 130.

While appellant has not produced a convincing and persuasive argument sufficient to warrant reversal of the conclusion of the Geological Survey, appellant's statement of reasons does raise certain doubts whether exercise of the surface rights of the lands under the public sale application would unreasonably interfere with operations under the mineral leasing law. This factor, coupled with the lack of reasons in the record to support Geological Survey's conclusion, persuades us that the case should be remanded for further consideration and delineation by Geological Survey as to the basis for its conclusion.

We note that the lands sought in secs. 32 and 33, T. 54 N., R. 72 W., are affected by an oil and gas lease within the Gas Draw Field KGS, as well as the Gas Draw Muddy Sand Unit Agreement. If operations under the oil and gas provisions of the Mineral Leasing Act do not unreasonably interfere with coal operations, we are hard put to comprehend why disposal of the surface would so interfere.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further consideration.

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Frederick Fishman
Administrative Judge

We concur:

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Douglas E. Henriques
Administrative Judge

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Edward W. Stuebing
Administrative Judge